identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: **MAR 05 2010**

SRC 07 800 15621

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a postdoctoral research fellow. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, we uphold the director's decision.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. from the University of North Texas. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "in the national interest." The Committee on the

Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215, 217-18 (Comm'r. 1998) (hereinafter "NYSDOT"), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, it must be shown that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

We concur with the director that the petitioner works in an area of intrinsic merit, molecular biology, and that the proposed benefits of his work, improved health care and environmental management, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *NYSDOT*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet

the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

The petitioner submitted evidence of his membership in the American Society for Microbiology (ASM) but no evidence that this membership is indicative of any influence in the field. We note that membership in professional associations is one criterion for establishing eligibility as an alien of exceptional ability, a classification that normally requires an approved alien employment certification. 8 C.F.R. § 204.5(k)(3)(ii)(e). We cannot conclude that meeting one criterion, or even the requisite three criteria, for that classification warrants a waiver of the alien employment certification process in the national interest. *See id.* at 218, 222.

In addition, the petitioner submitted a 2007 travel award to attend the Texas and Southern Plains Zebrafish Conference, which reimbursed the petitioner for the $60 registration cost, and a 2002 student travel grant to attend the ASM General Meeting. These awards appear designed for promising young investigators needing financial assistance to attend meetings. Regardless, as with professional memberships, recognition from peers or organizations is one criterion for aliens of exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(F). As stated above, even if we were to find that the petitioner met the required three criteria for that classification, it would not resolve whether the alien employment certification should be waived in the national interest.

[redacted] Dean of the Arts and Sciences that the University of North Texas, notes that the petitioner is working in an area of research "that is of great interest to the National Institutes of Health and the National Science Foundation." The vast majority of research, if not all research, is funded by a government agency or private foundation. Any research, in order to be accepted for funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who is working with a government grant inherently serves the national interest to an extent that justifies a waiver of the job offer requirement.

Initially, the petitioner submitted one published article, two unpublished manuscripts, acceptance to present his work at the Texas Zebrafish Conference, a program for Graduate Research Day at the University of North Texas listing the petitioner as a speaker, a presentation at the Seventh International Conference on Zebrafish Development and Genetics and five presentations at ASM meetings. The Department of Labor's Occupational Outlook Handbook, (OOH), available at http://www.bls.gov/oco/ocos047.htm#training (accessed December 17, 2009 and incorporated into the

record of proceeding), provides that a solid record of published research is essential to obtain a permanent position in basic biological research. As a researcher must demonstrate published research prior to even obtaining a permanent job in the petitioner's field, published research alone cannot serve to set the petitioner apart from available U.S. workers with the same minimum qualifications. In order to evaluation the influence of the petitioner's publications and presentations, we will consider the petitioner's citation record and the reference letters.

In response to the director's request for additional evidence, the petitioner submitted evidence that he had published an additional two articles after the date of filing. The petitioner also submitted evidence that, according to counsel, demonstrates that the petitioner's 2007 review article in the *Journal of Thrombosis and Haemostasis* had been cited 87 times. In fact, the evidence submitted consists of a list of citations for an unknown article from an unknown source. Specifically, the document contains no internet address or other attribution. The petitioner's review article, citation number 37 for this unidentified article, is listed as having a "citation score" of 87. The record contains no evidence in support of counsel's assertion that a "citation score" is the number of times that an article has been cited. Regardless, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). We cannot ascribe any evidentiary value to a "citation score" from an unidentified source that is not amenable to verification, especially in support of the possible but highly unlikely claim that an article has accrued 87 citations in only a few months after publication. The only actual evidence of citations includes evidence from the website of the *Proceedings of the National Academy of Sciences (PNAS)* indicating that the petitioner's post-filing article in *PNAS* has been cited once and another *PNAS* article that postdates the filing of the petition citing the petitioner's unpublished data. We are not persuaded that these two citations are indicative of the petitioner's track record of success with some degree of influence on the field as a whole.

As the petitioner's documented citation record is not notable, we look to the reference letters supporting the petition. U.S. Citizenship and Immigration Services (USCIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

In evaluating the reference letters, we note that letters containing mere assertions of a positive response in the field are less persuasive than letters that provide specific examples of how the petitioner has influenced the field. In addition, letters from independent references who were

previously aware of the petitioner through his reputation and who have applied his work are the most persuasive.

As stated above, the petitioner obtained his Ph.D. from the University of North Texas and has been working there as a postdoctoral research fellow. The initial letters were all from members of the petitioner's field in Texas. In response to the director's request for additional evidence, the petitioner submitted additional letters from individuals in Texas. While we will consider the content of these letters below, letters exclusively from Texas cannot generally establish the petitioner's influence outside that state.

[redacted], a professor at Texas Woman's University, asserts that he was on the petitioner's Ph.D. research committee. [redacted] asserts that the petitioner has a unique combination of knowledge, ability and skills in microbiology and molecular biology techniques as well as computer skills specific to gene databases. It cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *NYSDOT*, 22 I&N Dec. at 221.

More specifically, [redacted] asserts that the petitioner's doctoral research focused on an important pulmonary pathogen in individuals with Cystic Fibrosis, *Burkholderia cepacia*. [redacted] explains that this bacterium is very resistant to antibiotics but is an excellent candidate for bioremediation because it uses many different substrates as carbon and energy sources. The petitioner focused on one of the pyrimidine biosynthetic pathways of the bacterium. During this research, according to [redacted], the petitioner discovered that the regulatory enzyme aspartate transcarbomylase (ATCase) of *Burkholderia cepacia* is regulated by autocleavage. While [redacted] characterizes this result as a "breakthrough discovery," he merely speculates that it "will lead us toward greatly advanced understanding of the relationship of bacteria in evolution." [redacted] also asserts that the petitioner constructed an ATC1 knocked out *Burkholderia cepacia* using gene manipulation, which lost the ability to produce virulent factors. According to [redacted] this result suggested that ATC1 is involved in the production of virulent factors and ATC2, which is expressed only under conditions of stress or in a *pyrB* background, is not. While [redacted] characterizes this work as "fascinating," he merely speculates that it "will open the door to make a treatment for CF patient[s] infected by *B. cepacia*."

[redacted], a professor at the University of North Texas, asserts that the petitioner discovered that genetically modified *Burkholderia cepacia,* while losing its pathogenic property, can survive without having additional food sources. [redacted] explains that this work reveals that the bacterium "is a potential promoter for plant promoter for plant growth even reducing the abusing amount of fertilizers, and bioremediation tool to clean up oil pollutant."

[redacted] acknowledges that while the petitioner did present this work, he had yet to publish it. The record lacks evidence of the influence of this work. For example, the record does not establish that any

independent laboratory, pharmaceutical company or agricultural manufacturer is pursuing a treatment of *Burkholderia cepacia* or the creation of a fertilizer or solution for oil clean up based on the petitioner's work.

[redacted] notes that the petitioner is now working with fish and that this research is supported by government grants. As stated above, however, it can be argued that most research, in order to receive funding, must present some benefit to the general pool of scientific knowledge. It does not follow that every researcher working with a government grant inherently serves the national interest to an extent that justifies a waiver of the job offer requirement.

[redacted] the petitioner's supervisor at the University of North Texas, discusses the petitioner's work with zebrafish. [redacted] explains that the petitioner assisted with the move of [redacted] fish facility from a previous institution to form the zebrafish research facility at the University of North Texas. On appeal, [redacted] asserts that this work received "fabulous reviews" and that it is being revised for publication. An article that is not favorably reviewed during the requisite peer review process employed by scientific journals would be unlikely to be published. Thus, favorable peer reviews do not separate the petitioner's work from any other published article. Moreover, this work had yet to be published as of the date of filing, the date as of which the petitioner must establish his eligibility. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. at 49. While the petitioner's assistance in establishing this facility was clearly of value to Dr. Jagadeeswaran, the record does not establish that the act of moving this facility has been influential in the field.

[redacted] further asserts that the petitioner "has been instrumental in characterizing the protease activity which I discovered several years ago." On appeal, [redacted] clarifies that while he advanced the idea, the petitioner's execution was noteworthy. According to [redacted], the petitioner discovered that the protease activity comes from the gills, mouth and nose of the fish and that this protease is present in the human gut as trypsin. [redacted] asserts that this finding, which suggests that the protease may protect fish from bleeding, is novel and explains the evolution of blood clotting in vertebrates whose blood clotting factors arose from trypsin. [redacted] speculates that this work "will help to advance treatment of diseases like hemophilia that inflict millions of people."

[redacted] further discusses the petitioner's creation of a hyperglycemic condition in fish to study thrombosis associated with hyperglycemia. [redacted] explains that patients with diabetes, the absence of or decrease in insulin causes hyperglycemia (elevated levels of blood glucose). In pursuing this research, the petitioner discovered, according to [redacted], that hyperglycemia results in venous thrombosis rather than arterial thrombosis, which "may lead to novel therapies to treat diabetes for thrombotic complications." Once again, the record lacks evidence that this work was already influential as of the date of filing. For example, the petitioner did not submit evidence that this work was widely cited as of the date of filing.

[redacted] asserts that the petitioner's continued participation is crucial for the success of ongoing research in [redacted] laboratory. In a second letter and again on appeal, [redacted] asserts that the petitioner is the only person with the necessary training and experience to perform the types of experiments performed in [redacted] laboratory and that the petitioner's work will form the basis of a new grant application. The petitioner, however, must demonstrate sufficient past achievements influential in the field in order for us to consider such arguments. While [redacted] notes that the petitioner's work was presented and well received by representatives of the National Institutes of Health (NIH), the record contains no suggestion of the work's influence such as documentation of wide citation or letters from independent researchers in the health industry affirming their use of the petitioner's results in pursuing hemophilia treatments.

[redacted] Chair of the Department of Biological Sciences at the University of North Texas, provides similar information to that discussed above. He acknowledges that the petitioner's research has been presented and published in the *Journal of Thrombosis and Haemostasis* but is only in preparation for additional publications, including in *Nature Chemical Biology.* [redacted] speculates that the petitioner's research with *Burkholderia cepacia* "will be useful to find out treatment" for infection by this agent and shows that the agent "will be a good candidate for bioremediation and plant fertilization." He further speculates that the petitioner's research with zebrafish "will help to treat diseases like Cystic Fibrosis and Hemophilia." While [redacted] concludes that the petitioner "is one of the most talented researchers who have the special combination of interdisciplinary knowledge and skills," he does not provide examples of how the petitioner's work is being applied in the field.

Similarly [redacted], the Coordinator of all the Pre-Health Professional Programs and Joint Admission Medical Program Faculty Director at the University of North Texas, discusses the potential benefits of the petitioner's work. Specifically, she asserts that his work with *Burkholderia cepacia* can be used to replace the wild type of this agent with a non-virulent variety, which can also be used to bioremediate soil polluted by oil spills or recalcitrant chemicals. She does not identify any independent industrial, pharmaceutical or academic laboratory pursuing these uses of the petitioner's work. [redacted] also reiterates the claim in other letters that the petitioner's work with zebrafish "will open a new door to develop drugs for [a] disorder of hemostasis." Once again, she does not identify any independent pharmaceutical or academic laboratory pursuing the development of such drugs.

[redacted] concludes as follows:

> [The petitioner] is proficient in all aspects of molecular biology laboratory techniques such as protein purification, Southern blotting, Western blotting, polymerase chain reaction (PCR) and mutagenesis. He is also well versed in microbiological laboratory techniques and has taught [at] the Applied Microbiology laboratories at the University of North Texas for many years. These diverse skills and his top-notch research capabilities can rarely be found among those peers with similar education or working background.

As stated above, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *NYSDOT*, 22 I&N Dec. at 221.

[redacted], a professor at the University of Texas' Health Center at San Antonio, asserts that he knows the petitioner through his presentations. [redacted] provides similar information to that discussed above. In a second letter, [redacted] asserts that the petitioner is one of the few individuals who can perform the assays necessary for his work, which allowed him to participate in research published in *PNAS*. As stated above, special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Id.* In addition, we will not presume the significance of an article from the journal in which it appeared. It is the petitioner's burden to demonstrate the significance of the individual article. Significantly, [redacted] does not suggest that he personally has applied the petitioner's work. This letter cannot demonstrate the petitioner's influence outside of Texas.

On appeal, the petitioner submits two additional letters. While [redacted] a professor at Baylor College of Medicine, explains that he has never worked with the petitioner, he acknowledges that he collaborates with [redacted] [redacted]s letter contains similar language to the previous letters. For example, [redacted] asserts that the petitioner's work on the secretion of trypsin from the gills of injured fish "may have profound impacts on understanding how our system of stopping bleeding works." More specifically, [redacted] states that the petitioner's research on trypsin "spurred significant progress of an *in vivo* thrombosis assay utilized with the zebrafish model" which could "eventually be developed [in]to [a] clinical test for humans." [redacted] does not identify any laboratory pursuing the development of such a test for humans based on the petitioner's work. Rather, [redacted] asserts that that at Baylor College of Medicine, the petitioner's technique "led us to large-scale screening of fish inflicted with blood clotting disorders and a suitable tool to study genetics of development and disease." This research, however, would appear to be part of [redacted] collaboration with [redacted] and does not establish the petitioner's influence beyond his supervisor.

The petitioner also submits a letter from [redacted] a professor at the National University of Singapore. This is the only letter from a reference outside of Texas. [redacted] explains that in 2006 he gave an invited talk at the University of North Texas, at which time he visited the zebrafish facility the petitioner helped set up. While [redacted] praises the efficiency of the facility, he does not suggest its design is being duplicated elsewhere. In general, [redacted] provides information similar to that discussed above. [redacted] also states that his own laboratory recently researched new anti-coagulant reagents and that the petitioner's technique was useful in testing the activity of the reagents. It is not clear how much of this work predated the filing of the petition. Regardless, testimony from one independent researcher that he found the petitioner's research useful cannot

establish the petitioner's wider influence. For the reasons discussed above, the record lacks evidence of even moderate citation or other evidence of his influence in the field as a whole.

While the petitioner's research is no doubt of value, it can be argued that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any Ph.D. thesis or postdoctoral research, in order to be accepted for graduation, publication or funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who performs original research that adds to the general pool of knowledge inherently serves the national interest to an extent that justifies a waiver of the job offer requirement.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.